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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NO. 697

CARPENTER BODY WORKS, INC.,
Petitioner

v.

TOMMY D. McCULLEY, ET AL,
Respondent

PETITION FOR WRIT OF CERTIORARI
To the Court of Civil Appeals for the First Supreme Judicial District of Texas at Houston, Texas

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To the Court of Civil Appeals for the First Supreme Judicial District of Texas at Houston, Texas

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Carpenter Body Works, Inc., Petitioner herein, prays that a Writ of Certiorari be issued to review the final decree of the Court of Civil Appeals for the First Supreme Judicial District of Texas affirming the Judgment of the trial court overruling a Plea to the Jurisdiction filed by Petitioner, and holding that such order was interlocutory and not appealable (Tr. p.).

I. STATEMENT OF THE MATTER INVOLVED

1. The Court of Civil Appeals for the First Supreme Judicial District of Texas at Houston violated the rights of Petitioner under the due process clause of the Fourteenth Amendment or the Interstate Commerce Clause of the United States Constitution by holding that Petitioner was amenable to service of process by virtue of Article 2031b, V. A. T. S., and by further holding that an order of the trial court sustaining jurisdiction as to Petitioner was interlocutory and not appealable. (389 S.W.2d 331) The Court of Civil Appeals of Texas is thus the highest Court of a State in which a decision could be had within the meaning of 28 U.S.C.A., Section 1257, as construed by the Honorable Supreme Court of the United States, in

Michigan-Wisconsin Pipe Line Co. v. Calvert, U.S. Tex., 74 S.Ct. 396, 347 U.S. 157, 98 L.Ed., 583, rehearing denied;

Panhandle Eastern Pipe Line Co. v. Calvert, 74 S.Ct. 528, 347 U.S. 931, 98 L.Ed. 1083;

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2. This is a suit for personal injuries brought by Thomas D. McCulley, Jr., individually, and as next friend of his minor son, Thomas D. McCulley, III, against Carpenter Body Works, Inc., Commercial Body Corporation, Ervin Stoebner, and Pearland Independent School District, to recover damages for personal injuries received by Thomas D. McCulley, III, on or about the 7th day of September, 1962, as the result of the alleged fall from the rear door of a school bus by Thomas D. McCulley, III, onto Farm-to-Market Road 518 approximately four miles east of Pearland, in Brazoria County, Texas.

Ervin Stoebner and Pearland Independent School District filed a cross-action against the Appellant, Carpenter Body Works, Inc. To the Original Petition filed by Thomas D. McCulley, Jr. and the cross-actions filed by Ervin Stoebner and Pearland Independent School District, Carpenter Body Works, Inc filed a Plea of the Jurisdiction as permitted by Rule 120a, of the Texas Rules of Civil Procedure.

For sake of brevity, Carpenter Body Works, Inc. will be referred to in this Brief as "Carpenter", Commercial Body Corporation will be referred to as "Commercial", and Pearland Independent School District will be referred to as "School District."

At the hearing on the Plea to the Jurisdiction, the following facts were developed regarding lack of jurisdiction

of the trial court over Appellant, Carpenter Body Works, Inc.:

Carpenter was incorporated under the laws of the State of Indiana, (S.F. p. 10). It does not have a permit to do business in the State of Texas and has never had a permit to do business within the State of Texas, (S.F. p. 10). It has never transacted any business in the State of Texas, (S.F. p. 10). It has never sold any school buses within the State of Texas and has never sold any school buses outside of the State of Indiana, (S.F. pp. 10-11). The only place that it has sold school buses has been at Mitchell, Indiana, (S.F. p. 11). The policy of Carpenter is not to sell or deliver any school bus that it manufactures to any point anywhere and that all sales of Carpenter buses are f.o.b. Mitchell, Indiana, (S.F. p. 12). All buses to any purchaser are delivered at Mitchell, Indiana. It has never sold any school bus within the State of Texas, has never shipped any school bus to the State of Texas, never entered into any contract for any buses to be shipped from Indiana to Texas, (S.F. p. 12). Carpenter has never agreed to perform any type of work within the State of Texas, has never agreed to repair any school bus bodies manufacturd by it within the State of Texas, (S.F. p. 12) It has never furnished parts for a particular bus in Texas, within the State of Texas, (S.F. p. 13).

Carpenter has sold buses to Commercial and such sales took place in Mitchell, Indiana, (S.F. p. 13). The sale of all Carpenter buses are made free on board or "f.o.b." Mitchell, Indiana, (S.F. p. 13). Carpenter has never dealt directly with any ultimate user of a Carpenter bus in the State of Texas, such as a School District or any ultimate user or owner of a school bus manufactured by it, (S.F. p. 13).

Personnel of Carpenter have never come into the State of Texas for the purpose of repairing buses or doing any other type of work within the State of Texas, (S.F. p. 13).

Carpenter sells its buses f.o.b. Mitchell, Indiana, and no other place on earth, (S.F. p. 14).

Carpenter expects and requires that it be paid for its buses in Mitchell, Indiana, (S.F. p. 14).

Carpenter has never furnished any personnel, in the nature of a supervisor, for any activity within the State of Texas, none of its personnel have come to the State of Texas for the purpose of setting up any sales program of Carpenter buses, and it has never maintained or repaired any equipment within the State of Texas through its personnel, (S.F. p. 14).

Carpenter has never made any adjustment for any purchase of any merchandise sold by it within the State of Texas, (S.F. pp. 14-15). It has never exhibited any school buses at any County Fair within the State of Texas nor has it through its personnel ever solicited any business in the nature of taking orders from school districts or ultimate users or owners of buses within the State of Texas, (S.F. p. 15).

Carpenter does not and has never conducted any good will activities within the State of Texas, such as going by to see a school superintendent and taking him to lunch or to any private club or any other type of good will activity within the State of Texas, (S.F. p. 15). It has never done any "missionary" work with any ultimate user or owner of its buses within the State of Texas, (S.F. p. 15).

Carpenter does not own any warehouses within the State of Texas, does not maintain any office within the State of Texas, does not own any real or personal property within the State of Texas, leases no property within the State of Texas, rents no property within said State of Texas, nor does it in any way own or control any property of any type, character or description within the State of Texas, (S.F. pp. 15-16).

Carpenter does not have any policy where it would invite mechanics or other maintenance personnel to come to its Plant in Mitchell, Indiana, to be schooled in the maintenance of Carpenter buses, (S.F. p. 16).

At no time has Carpenter ever had or maintained an office or place of business anywhere within the State of Texas, has never maintained an address within the State of Texas, has never maintained a bank account or any bank accounts within the State of Texas, has never maintained any stock of goods within the State of Texas and has never had any property within the State of Texas belonging to it, (S.F. pp. 15-17).

No concern or individual has ever been paid any commission or received any commission on the sales of Carpenter buses within the State of Texas, (S.F. p. 17).

Carpenter does not have or maintain any control over Commercial in any way or manner and has never exerted any control of business activities of Commercial or any other corporation within the State of Texas, (S.F. p. 17).

Carpenter has never organized a sales organization within the State of Texas, has never laid out or suggested any sales route within the State of Texas and has never con-

cerned itself with methods or anything pertaining to the sale of Carpenter buses within the State of Texas, (S.F. p. 18).

Carpenter does not furnish any automobile or any other type of transportation to Commercial, does not pay any part or portion of any expense of automobile travel or any other travel expense of Commercial, does not give any rebate or help to Commercial or anyone else in the State of Texas pertaining to any cost of insurance or any other type of sales activity, (S.F. pp. 18-19).

Carpenter does not supply any samples of its buses within the State of Texas, has never designated an agent within the State of Texas for the purpose of accepting citation in suits against Carpenter within the State of Texas and has never authorized Commercial or any other Texas individual or concern to accept service of process for it in the State of Texas, (S.F. p. 19).

Carpenter has never authorized any individual or concern to act for it within the State of Texas in any capacity, (S.F. p. 19).

Carpenter does not maintain a depot for any replacement parts or tools for servicing defective or damaged Carpenter buses within the State and does not help or assist Commercial or any other person or concern with any sales of buses to school districts or other ultimate owners or users of any bus, (S.F. pp. 19-20).

Any bus sold by Carpenter to Commercial is made on an order made up by the purchase order of Commercial, (S. F. p. 20).

Any specifications or particular requirements of purchasers such as Commercial are not binding or effective upon Carpenter until they are approved and accepted in Mitchell, Indiana, by Carpenter and upon occasion Carpenter has rejected purchase orders, (S.F. p. 21).

Carpenter has never made any arrangements or agreements with any individual or concern concerning the matter of transportation of buses manufactured by it from Mitchell, Indiana, to the bus' ultimate destination, (S.F. p. 21).

Carpenter does not have any salesmen that travel from State to State and has never had any that travelled from State to State and especially within the State of Texas for the purpose of soliciting sales of Carpenter buses, (S.F. p. 21).

Carpenter does not concern itself with whether or not ony school district or any other ultimate purchaser pays Commercial for any buses sold by Commercial, (S.F. pp. 21-22)

Carpenter has never done any advertising of its products within the boundaries of the State of Texas designed specifically for the sale of its buses within the State.

Carpenter does not have an exclusive franchise with any one to sell its products within the State of Texas, did not have an exclusive franchise with anyone to sell its products within the State of Texas during the year 1962 or since the year 1962, (S.F. p. 22).

Carpenter has never joined with anyone or any concern in filing documents with the Secretary of the State of Texas in order that that person or concern might get a li-

cense or permit to do business within the State of Texas, (S.F. p. 23).

Carpenter has never joined with anyone or any concern in an endeavor to get a corporate charter or in any other way or wise to qualify it to do business within the State of Texas, (S.F. p. 23).

Carpenter does not pay for any local advertising within the State of Texas, (S.F. p. 23).

Carpenter has never had any correspondence with Pearland Independent Scool District or any officer connected with Pearland Independent School District, (S.F. p. 23).

Carpenter has never entered into any contract whereby it would sell buses within the State of Texas, has never authorized any individual or concern to receive any payment on its behalf for its product within the State of Texas, has never solicited by mail or otherwise sales of its buses within the State of Texas, (S.F. pp. 23-24).

Carpenter has never made any agreement or participated in the payment of any expenses for local advertising on TV Stations or in the local newspapers in the State of Texas, (S.F. p. 24).

Carpenter has never warranted its products, expressly or impliedly, in the State of Texas. It has never furnished any warranty to any ultimate purchaser of its buses in the State of Texas, (S.F. p. 24).

There is not any individual or concern within the State of Texas that has any authority to enter into any contract of sale of any Carpenter product or to make any collection of money for Carpenter within the State of Texas, (S.F. p. 25).

At the time of the hearing on the plea to the jurisdiction, Carpenter did not have any agent, servant or employee present within the State of Texas other than Mr. Bass, (the witness who testified at the hearing on the plea to the jurisdiction) and on September 7, 1962, Carpenter did not have any agent, servant or employee present within the State of Texas (S.F. p. 25).

Carpenter has never submitted any bid to the State Board of Control of the State of Texas and no person or concern has ever submitted any bid to the State Board of Control of the State of Texas for or on behalf of Carpenter. Carpenter does not make bids to the State Board of Control for any purpose, (S.F. p. 39).

Carpenter has never agreed to meet or exceed the specifications of the State Board of Control of the State of Texas, (S.F. p. 41).

Carpenter has never agreed to meet or exceed the plans and specifications of the Board of Control of the State of Texas to Commercial, (S.F. pp. 41-42).

Carpenter does not control the price of any bus by Commercial. Carpenter maintains an established price f.o.b. Mitchell, Indiana, and its buses are sold to Commercial and other purchasers at that price. Carpenter does not require Commercial or any other purchaser of its buses to resell any bus at a suggested list price, (S.F. p. 44).

Carpenter does not on its own ship any replacement part to any person within the State of Texas. If it receives orders from Commercial, it will abide by the orders of Commercial in regard to shipping such part. If Car-

penter receives an order for a part from any ultimate owner or user of a bus, such fact will be made known to Commercial and Carpenter will await Commercial's orders in that regard. If any part is shipped upon the order of Commercial to any person within the State of Texas, Carpenter charges Commercial not only for the part but also the transportation; however, there is nothing in the Statement of Facts that indicates that Carpenter has ever shipped a part to an owner or user of a bus within the State of Texas, (S.F. pp. 45-47).

Buses are usually driven from Carpenter's place of business in Mitchell, Indiana. Carpenter does not concern itself with who drives the buses away or who pays the drivers thereof, and Carpenter does not employ, engage or otherwise have any say over who drives the buses away and does not ever make any payment to any person for so driving the buses away from its Plant in Mitchell, Indiana, (S.F. pp. 47-48).

There is no understanding between Carpenter and any other person that it would not be paid for its buses until they reach their ultimate destination in Texas or elsewhere and are found to be in satisfactory working condition, (S.F. pp. 48-49).

When the Board of Control advertises for bids, Carpenter does not usually get a copy of such plans and specifications for the matter to be purchased, (S.F. pp. 49-50).

Carpenter does not own any stock in Commercial. No officer of Carpenter owns any stock in Commercial, (S.F. pp. 53-54, 55).

Not all of the transactions with Carpenter are for cash. Some transactions are for credit up to a thirty day period.

No mortgages are executed, retained or recorded by Carpenter for any bus sold on credit. The debt of such credit sale is not secured in any manner. Carpenter has never filed a chattel mortgage or any other type of mortgage in the County Clerk's Office in San Antonio, Bexar County, Texas, (S.F. pp. 57-58).

Carpenter did not manufacture the bus body called the "Carpenter Coach", Body Serial No. 35688, and Body Model No. 1600, described in Plaintiffs' Original Petition or in the interrogatories propounded to Carpenter, (S.F. p. 123).

Carpenter did not obtain the Chevrolet chassis inquired about in the interrogatories propounded to Carpenter, (S.F. p. 124), but accepted the consignment of the chassis from a third party. Carpenter paid nothing for the chassis upon which the bus body was mounted. Carpenter did not design any lock mechanism on any bus body, (S.F. p. 124).

Carpenter did not design the buzzer on the bus bodies assembled by it during the year 1960, (S.F. p. 125).

The warning buzzer on the bus that Plaintiffs supposed was occupied by the McCulley child at the time of the occurrence made the basis of this suit, was inspected by Carpenter before it left the premises by an employee of Carpenter, (S.F. pp. 125-126).

The only relationship between Carpenter and Commercial is that Commercial buys some bus bodies from Carpenter, (S.F. p. 128).

There have been only twenty-two communications between Commercial and Carpenter prior to September 7,

1962, whether oral or written, letter, telegram or what-not, (S.F. pp. 129-134).

Some written advertising was prepared by or ordered by Carpenter but it was at the instance and request of Commercial, (S.F. p. 135).

Such advertising above referred to was not for the purpose of promotion of sales of Carpenter buses within the State of Texas, specifically, because the use of the advertising material was determined entirely by Commercial, (S.F. p. 136).

Regardless of how confused, reluctant or uncooperative the Witness Stoebner might have been at the time of the hearing and whether or not any credence can be placed in his testimony, after fully understanding the questions, he testified at page 80 of the Statement of Facts that on one occasion prior to September 7, 1962, he checked the rear door to see if it would open and that it did open at such time and that the buzzer did work at such time.

The door on the bus from which the McCulley child is alleged to have fallen was inspected shortly after the alleged accident, (S.F. p. 85), and it was found that you could not open the door from the inside or outside by accident and that pressure in itself would not open the door. At the time the door to the bus from which the McCulley child is alleged to have fallen was inspected, the locking mechanism and the buzzer—the door handle, the lock and the buzzer—were operative at that time.

At the time the bus which is alleged to have been the one from which the McCulley child fell was driven away from the factory by Mr. Backhaus, the matter of the

buzzer and the rear door were checked and were found to have been in good working order and operative, (S.F. p. 102).

3. The Trial Court entered judgment overruling the Plea to the Jurisdiction filed by Carpenter Body Works, Inc. (Trial Ct. Tr. pp43). The Court of Civil Appeals affirmed the judgment of the Trial Court (Opinion, *Carpenter Body Works, Inc., et al. v. Tommy D. McCulley, Jr., et al.*, 389 S.W.2d 331, a copy of which is hereto appended).

4. Petitioner contends that in reaching this result, the Texas Court of Civil Appeals ruled contrary to the principles of law announced by this Court, in

Hanson v. Denckla, 357 U.S. 235 (1958);
International Shoe Company v. State of Washington, 326 U.S. 310, 66 Sup. Ct. 154, 90 L.Ed. 95.

II. JURISDICTION

1. Jurisdiction to grant this petition is sustained by Title 28, U.S.C.A., Section 1257, Subsection (3). (June 25, 1948, c. 646, 62 Stat. 929).

2. The judgment of the Court of Civil Appeals of Texas was rendered April 8, 1965, rehearing was denied April 29, 1965, as shown by the opinion reported in 389 S.W.2d 331, a copy of which is hereto appended.

3. As shown above, the Court of Civil Appeals is the highest Court of the State in which a decision could be had within the meaning of 28 U.S.C.A., Sec. 1257. Application for writ of error in the Supreme Court of Texas was refused, July 14, 1965, and motion for rehearing of

application for writ of error was overruled July 28, 1965. (Certified copies of both orders are included in the transcript which accompanies this application).

4. The constitutionality of holding Carpenter Body Works, Inc. amenable to Texas Jurisdiction was first questioned in its orginal pleading (Plea to the Jurisdiction, Tr. p. 8.).

III. QUESTION PRESENTED

The question presented is whether the holding of the Texas Courts that Petitioner, a foreign corporation, is amenable to service of process in an *in personam* action brought in Texas violates Petitioner's rights under the due process clause of the Fourteenth Amendment to the United States Constitution.

IV. REASONS RELIED ON FOR ALLOWANCE OF WRIT

Reasons relied on for the allowance of Writ of Certiorari

(1) Carpenter Body Works, Inc. was not present in the State of Texas at any time material to the occurrences made the basis of this suit.

(2) Carpenter Body Works, Inc. did not have "minimal contacts" within the State of Texas at any time material to the occurrences made the basis of this suit that would make it amenable to jurisdiction of the Texas Courts.

(3) The procedure provided by the Courts of Texas require a foreign litigant to litigate the matter of jurisdiction twice (once on a hearing of the Plea to the Jurisdic-

tion for which there is no appeal, and, secondly, at the time of hearing on the trial of the merits).

(4) The procedure in Texas requires a foreign litigant to litigate a case on the merits in order to determine the question of jurisdiction when local litigants are not so required.

(5) Because the Courts of the State of Texas fail to provide any procedure for a foreign litigant to appeal an erroneous holding that the State of Texas has jurisdiction over such foreign litigant.

V. ARGUMENT AMPLIFYING REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

There is clearly no jurisdiction over Carpenter Body Works, Inc. in the District Court of Brazoria County, Texas, under the historical concepts of jurisdiction long known to the jurisprudence of the State of Texas and to this court. There is no jurisdiction in the District Court of Brazoria County, Texas, of Carpenter Body Works, Inc. under the newly established concept of "minimal contacts" espoused in the case of *International Shoe Company v. State of Washington*, 326 U.S. 310, 66 Sup.Ct. 154, 90 L.Ed. 95. The holding of the Court of Civil Appeals in the instant cause clearly violates the injunction and warning of the Supreme Court of the United States in the case of *Hanson v. Denckla*, 357 U.S. 235 (1958), reading as follows:

> "* * * But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence

> of territorial limitations on the power of the respective states. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him."

The decision of the Court of Civil Appeals of Texas (Appendix A) in holding that the instant order is not an appealable order denies to this Petitioner and litigant the rights espoused by the Supreme Court of the United States in the case of *Local No. 438 Construction & Gen. Lab. U. v. Curry*, 371 U.S. 542, 83 S.Ct. 531 (1963).

Why have a purported right as that thought to be conferred by Rule 120-A, *T. R. C. P.* (Appendix B), if there is no vehicle of appeal from an erroneous decision of the Trial Court? Isn't it reasonable to assume that a litigant should have the same rights in asserting a plea to the jurisdiction as asserting a plea of venue as found in the case of *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 83 S.Ct. 520, 9 L.Ed.2d 523 (1963)?

Unless a litigant has a right to appeal from an order overruling the plea to the jurisdiction filed pursuant to *Rule 120-A* there is in effect no relief and such a construction of *Rule 120-A* is erroneous.

Petitioner submits that when a trial court determines that it has jurisdiction to hear a suit by overruling a defendant's sworn motion challenging jurisdiction filed pursuant to Rule 120a, *V. A. T. R.*, such ruling is and should be appealable prior to a trial of the suit on its merits. Section 1 of Rule 120a, *V. A. T. R.* (Appendix B) requires that the sworn plea objecting to jurisdiction of the trial

court be filed prior to the filing of a plea of privilege or any other pleading. Section 2 of this Rule provides as follows:

> "Any motion to the jurisdiction provided for herein shall be heard and determined before a plea of privilege or any other plea or pleading may be heard. No determination of any issue of fact in connection with the objection to jurisdiction is a determination of the merits of the case or any aspect thereof."

Thus the Rule requires that a trial court dispose of the jurisdictional issue before it can consider even the venue question. Undoubtedly, a trial court's action on a plea of privilege is appealable. Article 2008, *V. A. T. S.* Petitioner, therefore, submits that *Rule 120a*, at least by strong implication, authorizes appeal from a determination of jurisdiction adverse to a defendant. For there would seem to be no logic in a Rule which requires one type of preliminary question which is not appealable to be heard prior to the hearing of another type of preliminary question which is appealable.

To find that while an adverse ruling on a plea of privilege can be appealed while an adverse ruling on a plea to the jurisdiction cannot, even though the jurisdictional question must be disposed of first, would lead to several anomalous and undesirable results. For example, suppose A sues B in Brazoria County, and B files, in due order, a Plea to the Jurisdiction and a Plea of Privilege. Suppose B's jurisdictional plea is overruled, but his venue challenge is sustained. The case is then removed to Harris County. If the defendant cannot have had appellate review on the Brazoria District Court's ruling concerning jurisdic-

tion, the Harris County District Court will be forced to proceed with a costly, full-fledged trial in Harris County. Presumably this would be required even though the Harris County District Judge knows or is convinced that his counterpart in Brazoria County has committed a patent error, for this question will have previously been "heard and determined" pursuant to the provisions of *Rule 120a.*

Again, assume the same simple situation, except that Defendant's Plea of Privilege is overruled, and he appeals to the Court of Civil Appeals for relief. Suppose further that while studying the record on the venue problem the Court of Civil Appeals realizes that the trial court had no semblance of jurisdiction over the person of the defendant. In this situation, would the Court of Civil Appeals be authorized to consider the jurisdictional question on a Plea of Privilege appeal? Or would the Court of Civil Appeals have to send the case back for a trial on its merits knowing that it contained a fatal procedural defect that could not be corrected until appeal of the full suit? Is not the question of jurisdiction implicit in some venue problems? Petitioner believes this would not allow some fortunate defendants to appeal the jurisdictional question under the Plea of Privilege Article, while others would have to await a complete trial.

If a trial court's action on a *Rule 120a* plea is not appealable, inequities will result for plaintiffs as well as defendants. The most obvious disadvantage of such a procedural bottleneck is that either plaintiff or defendant may be put to an exhausting, expensive and complicated legal battle which could be completely voided by a jurisdictional question having nothing at all to do with the merits of the suit. In addition to this hazard, suppose

Plaintiff A sues Defendants B, C and D, after which Defendant B is dismissed by the trial court for want of jurisdiction over him. If Plaintiff A cannot appeal this order, then he must first try his case against the two remaining Defendants before getting a final determination of the jurisdictional question. *Texas Bank & Trust Co. of Dallas v. Clay*, 257 S.W.2d 774 (Tex.Civ.App. 1953, no history). So even if Plaintiff A is sustained in his jurisdictional contention on appeal, then he will have acquired the sometimes dubious privilege of retrying the case against Defendant B and perhaps in some instances also against the other Defendants.

Another reason why Petitioner believes that the Supreme Court of Texas should make a jurisdictional ruling appealable is to avoid the Plaintiff's pitfall of having the statute of limitations run in another state while the jurisdictional question is being finally determined. For example, suppose a citizen of Texas sues an Indiana corporation in a Texas Court for a tort. Through no fault of the Plaintiff, it takes four years to try the case on its merits and to appeal it to the Texas Supreme Court where it is held that the trial court lacked jurisdiction over the Indiana defendant. If the Indiana limitations statute is two years, then what position will the Texas Plaintiff find himself in when he attempts to sue in Indiana?

The case of *Local No. 438 Construction & Gen. Lab. U. v. Curry*, 371 U.S. 542, 83 S.Ct. 531, (1963), is a case in which the United States Supreme Court recognized that to force a defendant to face the trial on the merits twice in different jurisdictions would be to create an unjust, unreasonable and onerous burden. In holding that an

appeal would be had on the refusal of a Georgia trial court to issue an interlocutory injunction the United States Supreme Court stated as follows:

> "Unless this judgment is reviewable now, petitioner will inevitably remain subject to the issuance of a temporary injunction at the request of the respondents and must face further proceedings in this state court which the state courts have no power to conduct. If the permanent injunction issues, petitioner could then come here seeking the doubtful privilege of relitigating the entire matter before the National Labor Relations Board." (371 U.S. 550; 83 S.Ct. 536)

The attempted service of process on Carpenter Body Works, Inc. under Article 2031b, V. A. T. S., is invalid and the following authorities support this contention that such attempted service is invalid:

Article 8.01 of the *Texas Business Corporation Act;*
Article 8.08 of the *Texas Business Corporation Act;*
Sampson v. Vernon Law Book Company, 295 S.W.2d 429 (Ft. Worth Civ.App., 1956, no writ history);
Kimball-Krough Pump Co. v. Judd, 88 S.W.2d 579 (Amarillo Civ.App., 1935, no writ history);
Caddell v. J. R. Watkins Medical Co., 227 S.W. 226 (San Antonio Civ.App., no writ history);
A. Leschen & Sons Rope Co. v. Moser, 159 S.W. 1018 (San Antonio Civ.App. 1913, no writ history);
Gray Co., Inc. v. Ward, 145 S.W.2d 650 (Tex.Civ. App. 1940, application dismissed, judgment correct);
Robbins v. Benjamin Air Rifle Co., 209 F.2d 173 (5th Circuit, 1954);
Rosenthal v. Frankfort Distillers Corp., 193 F.2d 137 (5th Circuit 1951);

Pulson v. American Rolling Mill Co., 1 Cir., 170 F.2d 193;

Nielsen v. Arabian American Oil Co., 206 F.2d 391 (5th Cir., 1953);

Stoke v. Peter Fox Brewing Co., 22 Fed.Sup. 892 (District Court for the Northern District of Texas, 1938);

Street & Smith Publications, Inc. v. Spikes, 120 F.2d 895 (5th Cir., 1941), certiorari denied 62 S.C. 102, 314 U.S. 653;

Clements v. MacFadden Publications, Inc., 28 Fed, Sup. 274 (District Court for the Eastern District of Texas, 1939);

Mueller v. Steel Case, Inc., 172 F.Sup. 416 (District Court of Minnesota, 1959);

Beck v. Spindler, 99 N.W.2d 670 (Minn. S.C. 1959);

In support of its position to hold Carpenter amenable to service of process by virtue of Article 2031b, *V. A. T. S.*, under the facts of this case would be unconstitutional, the following authorities are cited:

International Shoe Company v. State of Washington, 326 U.S. 310, 66 Sup.Ct. 154, 90 L.Ed. 95;

McGee v. International Life Insurance Co., 355 U.S. 220 (1957);

Hanson v. Denckla, 357 U.S. 235 (1958);

Sampson v. Vernon Law Book Company, 295 S.W.2d 429 (Ft. Worth Civ.App., 1956, no writ history);

Kimball-Krough Pump Co. v. Judd, 88 S.W.2d 579 (Amarillo Civ.App. 1935, no writ history);

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Robbins v. Benjamin Air Rifle Co., 209 F.2d 173 (5th Circuit, 1954);

Rosenthal v. Frankfort Distillers Corp., 193 F.2d 137 (5th Circuit 1951).

VI. CONCLUSION

It is submitted that the opinion of the Court of Civil Appeals of Texas is in conflict with the express holdings in prior cases by this Court and that the controlling decisions of this Court pertaining to jurisdiction of foreign corporations require that this case be reversed; that a Writ of Certiorari should be granted in order that this Court may review the record and the opinion of the Court of Civil Appeals of Texas, and finally reverse that judgment and render judgment that Petitioner be dismissed from the instant suit; and Petitioner prays for such other and further relief, general and special, at law and in equity, to which it may be justly entitled.

Respectfully submitted,

WILEY B. THOMAS, JR.
108 East Magnolia Street
Angleton, Texas
Counsel for Petitioner

Of Counsel:

JOHN BALLARD BENNETT
THOMAS & BENNETT
108 East Magnolia Street
Angleton, Texas

October _____, 1965

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petition for Writ of Certiorari has been mailed on the day of October, 1965, to the attorneys for Respondents, as follows; Messrs. Ralph K. Miller, Miller & Gann, Attorneys at Law, 2106 South Coast Building, Houston, Texas, Leland B. Kee, Davis & Kee, Attorneys at Law, 912 North Velasco Street, Angleton, Texas, attorneys for Respondents; to Ernest A. Knipp, Attorney at Law, 701 Citizens State Bank Building, Houston, Texas, attorney for Ervin Stoebner; Derral K. Sperry, Attorney at Law, P.O. Box 6908, Houston 5, Texas, attorney for Commercial Body Corporation; and to Sam Lee, Attorney at Law, P. O. Drawer R, Angleton, Texas, attorney for Ervin Stoebner.

WILEY B. THOMAS, JR.

APPENDIX "A"

CARPENTER BODY WORKS, INC., *Appellant,*
v.
TOMMY D. McCULLEY, JR., ET AL., *Appellees*

No. 14,603

Court of Civil Appeals of Texas
Houston.
April 8, 1965.

Rehearing Denied April 29, 1965

BELL, Chief Justice.

This is an appeal from an order of the trial court overruling appellant's plea to the jurisdiction of the trial court, the plea being asserted in a special appearance made pursuant to the right conferred by Rule 120a, Texas Rules of Civil Procedure.

Tommy D. McCulley, Jr., individually and as next friend of Tommy D. McCulley, III, sued appellant and three other defendants, to recover damages for personal injuries suffered by Tommy, III, when a door on a school bus came open while Tommy III was a passenger, causing him to fall from the bus. Appellant was alleged to be the manufacturer of the bus. It was alleged that appellant was a

foreign corporation doing business in Texas and that it had failed to appoint an agent for service. It was asked that service be made upon the Honorable Crawford D. Martin, Secretary of State, pursuant to the provisions of Article 2031b, Sec. 3 Vernon's Ann.Tex.Civ.St. Service was so made. Appellant filed its motion that the service be held invalid and that it be quashed.

Thereafter, two of the other defendants filed cross-actions against appellant. To each cross-action appellant also made a special appearance for the sole purpose of attacking the jurisdiction of the court on the ground that it was not amenable to service in an in personam action brought in Texas.

When the record was filed in this Court, we raised the question as to whether the Court had jurisdiction since the order overruling the plea to the jurisdiction was thought to be interlocutory and we knew of no statute or rule authorizing an appeal. We requested the filing of briefs by counsel directed solely to the question of our jurisdiction. Briefs have been filed by said counsel.

We are of the view that the order appealed from is purely interlocutory and there is no rule or statute authorizing an appeal from an order overruling a plea to the jurisdiction.

Rule 120a is silent as to appealability in such case but by strong implication it precludes an appeal. It provides in paragraph 3:

> "If the objectioi to jurisdiction is overruled, the objecting party may thereafter appear generally for any

> purpose. Any such special appearance or such general appearance shall not be deemed a waiver of the objection to jurisdiction when the objecting party or subject matter is not amenable to process issued by the courts of this State."

This language to us shows an intention that the party whose plea to the jurisdiction is overruled shall thereafter proceed to trial on the merits and if he suffers adverse judgment on the merits, his complaints on appeal may encompass one complaining of the trial court's action in overruling his plea to the jurisdiction.

The only Texas case we have found discussing the appealability of an order overruling a plea to the jurisdiction is Fishbein v. Thornton, Tex.Civ.App., 247 S.W.2d 404. In that case it was stated that an order overruling a plea to the jurisdiction was interlocutory and not appealable. We are in accord with that statement.

The rule in most states is that such an order is interlocutory and not appealable in the absence of statutory authority. 30 A.L.R.2d 287, 291. Professor Wayne Thode of the University of Texas School of Law discusses Rule 120a in an article in 42 Texas Law Review 279. He there expresses the view that an order overruling a plea to the jurisdiction is interlocutory and not appealable.

Appeal dismissed.

APPENDIX "B"

RULE 120a. SPECIAL APPEARANCE

1. Notwithstanding the provisions of Rules 121, 122, and 123, a special appearance may be made by any party either in person or by attorney for the purpose of objecting to the jurisdiction of the court over the person or property of the defendant on the ground that such party or property is not amenable to process issued by the courts of this State. A special appearance may be made as to an entire proceeding or as to any severable claim involved therein. Such special appearance shall be made by sworn motion filed prior to plea of privilege or any other plea, pleading or motion; provided, however, that a plea of privilege and any other plea, pleading, or motion may be contained in the same instrument or filed subsequent thereto without waiver of such special appearance. The issuance of process for witnesses, the taking of depositions, the serving of requests for admissions, and the use of discovery processes, shall not constitute a waiver of such special appearance. Every appearance, prior to judgment, not in compliance with this rule is a general appearance.

2. Any motion to the jurisdiction provided for herein shall be heard and determined before a plea of privilege or any other plea or pleading may be heard. No determination of any issue of fact in connection with the objection to jurisdiction is a determination of the merits of the case or any aspect thereof.

3. If the court sustains the objection to jurisdiction, an appropriate order shall be entered. If the objection to juris-

diction is overruled, the objecting party may thereafter appear generally for any purpose. Any such special appearance or such general appearance shall not be deemed a waiver of the objection to jurisdiction when the objecting party or subject matter is not amenable to process issued by the courts of this State. Added by order of April 12, 1962, effective Sept. 1, 1962.

APPENDIX "C"

ART. 2031b. SERVICE OF PROCESS UPON FOREIGN CORPORATIONS AND NONRESIDENTS

Failure to appoint agent; designation of Secretary of State as lawful attorney

Section 1. When any foreign corporation, association, joint stock company, partnership, or non-resident natural person required by any Statute of this State to designate or maintain a resident agent, or any such corporation, association, joint stock company, partnership, or non-resident natural person subject to Section 3 of this Act, has not appointed or maintained a designated agent, upon whom service of process can be made, or has one or more resident agents and two (2) unsuccessful attempts have been made on different business days to serve process upon each of its designated agents, such corporation, association, joint stock company, partnership, or non-resident natural person shall be conclusively presumed to have designated the Secretary of State of Texas as their true and lawful attorney upon whom service of process or complaint may be made.

Engaging in business in state; service upon person in charge of business

Sec. 2. When any foreign corporation, association, joint stock company, partnership, or non-resident natural person, though not required by any Statute of this State to designate or maintain any agent, shall engage in business in this State, in any action in which such corporation, joint

stock company, association, partnership, or non-resident natural person is a party or is to be made a party arising out of such business, service may be made by serving a copy of the process with the person who, at the time of the service, is in charge of any business in which the defendant or defendants are engaged in this State, provided a copy of such process, together with notice of such service upon such person in charge of such business shall forthwith be sent to the defendant or to the defendants principal place of business by registered mail, return receipt requested.

Act of engaging in business in state as equivalent to appointment of Secretary of State as agent

Sec. 3. Any foreign corporation, association, joint stock company, partnership, or non-resident natural person that engages in business in this State, irrespective of any Statute or law respecting designation of maintenance of resident agents, and does not maintain a place of regular business in this State or a designated agent upon whom service may be made upon causes of action arising out of such business done in this State, the act or acts of engaging in such business within this State shall be deemed equivalent to an appointment by such foreign corporation, joint stock company, association, partnership, or non-resident natural person of the Secretary of State of Texas as agent upon whom service of process may be made in any action, suit or proceeding arising out of such business done in this State, wherein such corporation, joint stock company, association, partnership, or non-resident natural person is a party or is to be made a party.

Doing business in state; definition

Sec. 4. For the purpose of this Act, and without including other acts that may constitute doing business, any foreign corporation, joint stock company, association, partnership, or non-resident natural person shall be deemed doing business in this State by entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State, or the committing of any tort in whole or in part in this State.

Delivery of process to Secretary of State; forwarding copy

Sec. 5. Whenever process against a foreign corporation, joint stock company, association, partnership, or non-resident natural person is made by delivering to the Secretary of State duplicate copies of such process, the Secretary of State shall require a statement of the name and address of the home or home office of the non-resident. Upon receipt of such process, the Secretary of State shall forthwith forward to the defendant a copy of the process by registered mail, return receipt requested.

Non-residency after accrual of cause of action; service upon Secretary of State

Sec. 6. When any corporation, association, joint stock company, partnership or natural person becomes a non-resident of Texas, as that term is commonly used, after a cause of action shall arise in this State, but prior to the time the cause of action is matured by suit in a court of competent jurisdiction in this State, when such corpora-

tion, association, joint stock company, partnership or natural person is not required to appoint a service agent in this State, such corporation, association, joint stock company, partnership or natural person may be served with a citation by serving a copy of the process upon the Secretary of State of Texas, who shall be conclusively presumed to be the true and lawful attorney to receive service of process; provided that the Secretary of State shall forward a copy of such service to the person in charge of such business or an officer of such company, or to such natural person by certified or registered mail, return receipt requested.

Cumulative effect of act

Sec. 7. Nothing herein contained shall be construed as repealing any statute in force in this State in reference to service of process, but this Act shall be cumulative of all existing statutes. Acts 1959, 56th Leg., p. 85, ch. 43.

APPENDIX "D"

§ 1257. STATE COURTS; APPEAL; CERTIORARI

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

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No. 697

IN THE

Supreme Court of the United States

OCTOBER TERM 1965

CARPENTER BODY WORKS,

Petitioner,

v.

TOMMY D. McCULLY, JR., ET AL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

RESPONDENTS' BRIEF IN OPPOSITION

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Attorney for Respondents

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RESPONDENTS' BRIEF IN OPPOSITION

To the Honorable Supreme Court of the United States:

The District Court of Brazoria County, Texas entered an *order* overruling Petitioner's plea to the jurisdiction of that court. Petitioner sought to appeal from such order to the Texas Court of Civil Appeals at Houston. That court dismissed the appeal, holding that it did not have jurisdiction because the order appealed from was purely interlocutory and that Texas had no rule or statute authorizing an appeal from an order overruling a plea to the jurisdiction. *Carpenter Body Works, Inc.* v. *Tommy D. McCulley, Jr., et al,* 389 S.W. 2d 331, error ref'd. (Appendix "A")

Respondents disagree with the statements contained in the Petition for Writ of Certiorari, to the effect that the Court of Civil Appeals *affirmed* a *judgment* of the district court and *held* that Petitioner was amenable to service of process by virtue of Article 2031b, Revised Civil Statutes of Texas.

The opinion of the court below expressly states that *if Petitioner suffers adverse judgment in a trial on the merits, its complaints on appeal may encompass one complaining of the trial court's action in overruling its plea to the jurisdiction.* (Appendix "A", page 2a)

RESPONDENTS' GROUNDS IN OPPOSITION

The Petition for Writ of Certiorari should be refused because it discloses that this case does not involve (1) a final judgment (2) of a state court of last resort (3) which decides a federal question as required by the provisions of 28 U.S.C., Sec. 1257.

I.

THE ORDER OF THE STATE TRIAL COURT OVERRULING PETITIONER'S PLEA TO THE JURISDICTION WAS INTERLOCUTORY AND NOT A FINAL, APPEALABLE JUDGMENT

Article 2249, Revised Civil Statutes of Texas, provides that an appeal or writ of error may be taken to the Court of Civil Appeals from every *final* judgment of the district court in civil cases (Appendix "B"). Furthermore, Texas statutes provide for appeals from certain enumerated interlocutory orders (e.g. an appeal from an order overruling or sustaining a plea of privilege in venue cases is authorized by Article 2008, Revised Civil Statutes of Texas), but neither Article 2031b, Revised Civil Statutes of Texas, under which jurisdiction was asserted over Petitioner in the trial court, nor Rule 120a, Texas Rules of Civil Procedure, authorizing a special appearance by non-resident defendants, nor any other state statute or rule provides for a *separate* appeal from an order overruling a plea to the jurisdiction.

Although an order of a state trial court sustaining a motion to dismiss for want of jurisdiction is final and, therefore, appealable, an order overruling a motion to dismiss for want of jurisdiction is interlocutory, not appealable, and this Court has long held it lacks jurisdiction to review such an order by certiorari.[1]

Petitioner has not been deprived of the right of appeal. To the contrary, such right is expressly provided by Article 2249, Revised Civil Statutes of Texas. (Appendix "B") It is wholly within the prerogative of the state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction and the rules of practice to be applied in its exercise.[2]

In holding that the order appealed from was purely interlocutory and that no rule or statute authorized an appeal

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[1] "Had this motion been granted and judgment of dismissal been entered, clearly there would have been an end of the litigation and appeal would lie within Section 128. United States v. Carey, 9 Cir., 143 F. 2d 445; United States v. Marin, 9 Cir., 136 F. 2d 388. But denial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable. Cf. Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 63 S. Ct. 938, 87 L. Ed. 1185. See also Dieckmann v. United States, 7 Cir., 88 F. 2d 902. Certainly this is true whenever the question may be saved for disposition upon review of final judgment disposing of all issues involved in the litigation or in some other adequate manner." *Catlin* v. *United States,* 324 U.S. 229, 65 S. Ct. 631 at page 635, 89 L. Ed. 911 (1945).

[2] "Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law." *John* v. *Paullin,* 231 U.S. 583, 34 S. Ct. 178, 58 L. Ed. 381 (1913).

therefrom, the Texas Court of Civil Appeals correctly stated the state law applicable at that stage of this litigation.[3]

Just as the state appellate court was without jurisdiction to review the district court's order overruling Petitioner's plea to the jurisdiction (absent a state statute or rule so providing), this Court is also without jurisdiction to review.[4]

II.

THE DECISION OF THE TEXAS COURT OF CIVIL APPEALS WAS NOT BASED ON A FEDERAL QUESTION

Petitioner's attempted appeal from an order of the district court overruling Petitioner's plea to the jurisdiction was *dismissed* by the Court of Civil Appeals based on that court's decision that:

> "We are of the view that the order appealed from is purely interlocutory and that there is no rule or statute authorizing an appeal from an order overruling a plea to the jurisdiction." (Appendix "A")

The Texas Court of Civil Appeals, as previously noted, did not pass on the merits of Petitioner's plea to the juris-

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[3] "The judgment of the District Court overruling the plea to the jurisdiction was interlocutory and not appealable." *Fishbein* v. *Thornton*, 247 S.W. 2d 404 (no writ hist.).

[4] "As the supreme court of the state did not pass upon the merits of the case or upon the correctness of any of the rulings below, but, on the contrary, held that it was powerless to do so because its appellate jurisdiction was not invoked in accordance with the laws of the state, we do not perceive any theory upon which its judgment of dismissal may be reviewed by us consistently with the familiar limitations upon our authority. . . . Certainly no Federal right was denied by that court, and if, as was held by it, its appellate jurisdiction was not properly invoked, no Federal question was before it for decision." *John* v. *Paullin*, 231 U.S. 583, 34 S. Ct. 178, 58 L. Ed. 381 (1913).

diction of the trial court. That question has not been determined by a final judgment of a state court of last resort, and is still subject to review should there be an appeal from a final judgment of the trial court on the merits of this case.

The opinion of the court below is clearly based on the fact that the applicable *procedural* law of Texas does not provide for a *separate* appeal from an interlocutory order of a district court overruling a plea to the jurisdiction. Thus the decision of the Texas court sought to be reviewed here was not based on a federal question within the meaning of 28 U.S.C., Sec. 1257.

There was involved below nothing but the application of Texas procedural law. Absent the decision of a federal question as a necessary basis of the opinion below, this Court has consistently held that it lacks jurisdiction to review the ruling of the state court.[5]

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[5] "It is settled law that, to give this court jurisdiction of a writ of error to a state court, it must appear, affirmatively, not only that a federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the federal laws or constitution, or that the judgment, as rendered, could not have been given without deciding it. Murdock v. Memphis, 20 Wall. 590; Cook Co. v. Calument & C. Canal & Dock Co., 138 U.S. 635. 11 Sup. Ct. Rep. 435. It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the constitution or laws of the United States, another question, not federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the federal question, to sustain the judgment, this court will not review the judgment." *Eustis* v. *Bolles,* 150 U.S. 361, 14 S. Ct. 131 at page 132, 37 L. Ed. 1111 (1893); *Wood* v. *Cheeseborough,* 228 U.S. 667, 33 S. Ct. 706, 57 L. Ed. 1018 (1913).

III.

PETITIONER'S AUTHORITIES ON JURISDICTION DISTINGUISHED

Petitioner relies on *Mercantile National Bank at Dallas* v. *Langdeau,* 371 U.S. 555, 83 S. Ct. 520, 9 L. Ed. 2d 523. This Court expressly stated that *Mercantile* involved (1) a substantial claim (2) *appealable under state law* (3) involving a *federal* banking statute, rather than a state statute (4) from a *final* decision of the Texas Supreme Court (5) that was a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issue comprising Plaintiff's cause of action. Furthermore, this Court's jurisdiction was there noted under 28 U.S.C., Section 1257(2) rather than under 1257(3), relied upon by Petitioner here.

None of these elements is involved in the case at bar.

Petitioner also cites, and relies upon, *Local No. 438, Construction and General Laborers Union, A.F.L.-C.I.O.* v. *Curry,* 371 U.S. 542, 83 S. Ct. 531. There, too, a *federal* question had been *finally* decided by a state *court of last resort.*

Again, none of those jurisdictional prerequisites exists in the present case. There has been no determination, final or otherwise, of Petitioner's plea to the jurisdiction by any Texas appellate court.

Respondents submit that the Petition for Writ of Certiorari should be refused.

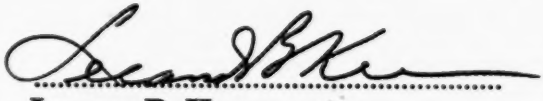
Respectfully submitted,

LELAND B. KEE

912 North Velasco Street
Angleton, Texas
Attorney for Respondents

CERTIFICATE OF SERVICE

A copy of Respondents' Brief in Opposition was served upon the following counsel of record on the 16th day of November, 1965: Wiley B. Thomas, Jr., 108 E. Magnolia Street, Angleton, Texas, John Ballard Bennett, Thomas & Bennett, 108 East Magnolia Street, Angleton, Texas, attorneys for Petitioner; Ernest A. Knipp, 701 Citizens State Bank Building, Houston, Texas, attorney for Ervin Stoebner; Derral K. Sperry, P. O. Box 6908, Houston 5, Texas, attorney for Commercial Body Corporation; and Sam Lee, P. O. Drawer R, Angleton, Texas, attorney for Ervin Stoebner, by depositing the same in the United States mail with first class postage thereon, properly addressed, in compliance with Rule 33 (1) of the Revised Rules of the Supreme Court of the United States.



LELAND B. KEE

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APPENDIX "A"

CARPENTER BODY WORKS, INC.,
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v.

TOMMY D. McCULLEY, JR., ET AL.,
Appellees.

No. 14,603

COURT OF CIVIL APPEALS OF TEXAS
HOUSTON.
April 8, 1965.

Rehearing Denied April 29, 1965

BELL, Chief Justice.

This is an appeal from an order of the trial court overruling appellant's plea to the jurisdiction of the trial court, the plea being asserted in a special appearance made pursuant to the right conferred by Rule 120a, Texas Rules of Civil Procedure.

Tommy D. McCulley, Jr., individually and as next friend of Tommy D. McCulley, III, sued appellant and three other defendants, to recover damages for personal injuries suffered by Tommy, III, when a door on a school bus came open while Tommy III was a passenger, causing him to fall from the bus. Appellant was alleged to be the manufacturer of the bus. It was alleged that appellant was a foreign corporation doing business in Texas and that it had failed to appoint an agent for service. It was asked that service be made upon the Honorable Crawford D. Martin, Secretary of State, pursuant to the provisions of Article 2031b, Sec. 3 Vernon's Ann. Tex. Civ. St. Service was so made. Appellant filed its motion that the service be held invalid and that it be quashed.

Thereafter, two of the other defendants filed cross-actions against appellant. To each cross-action appellant also made a special appearance for the sole purpose of attacking the jurisdiction of the court on the ground that it was not amenable to service in an in personam action brought in Texas.

When the record was filed in this Court, we raised the question as to whether the Court had jurisdiction since the order overruling the plea to the jurisdiction was thought to be interlocutory and we knew of no statute or rule authorizing an appeal. We requested the filing of briefs by counsel directed solely to the question of our jurisdiction. Briefs have been filed by said counsel.

We are of the view that the order appealed from is purely interlocutory and there is no rule or statute authorizing an appeal from an order overruling a plea to the jurisdiction.

Rule 120a is silent as to appealability in such case but by strong implication it precludes an appeal. It provides in paragraph 3:

> "If the objection to jurisdiction is overruled, the objecting party may thereafter appear generally for any purpose. Any such special appearance or such general appearance shall not be deemed a waiver of the objection to jurisdiction when the objecting party or subject matter is not amenable to process issued by the courts of this State."

This language to us shows an intention that the party whose plea to the jurisdiction is overruled shall thereafter proceed to trial on the merits and if he suffers adverse judgment on the merits, his complaints on appeal may encompass one complaining of the trial court's action in overruling his plea to the jurisdiction.

The only Texas case we have found discussing the appealability of an order overruling a plea to the jurisdiction is Fishbein v. Thornton, Tex. Civ. App., 247 S.W. 2d 404. In that case it was stated that an order overruling a plea to the jurisdiction was interlocutory and not appealable. We are in accord with that statement.

The rule in most states is that such an order is interlocutory and not appealable in the absence of statutory authority. 30 A.L.R. 2d 287, 291. Professor Wayne Thode of the University of Texas School of Law discusses Rule 120a in an article in 42 Texas Law Review 279. He there expresses the view that an order overruling a plea to the jurisdiction is interlocutory and not appealable.

Appeal dismissed.

APPENDIX "B"

ART. 2249. TO COURT OF CIVIL APPEALS

An appeal or Writ of Error may be taken to the Court of Civil Appeals from every final judgment of the district court in civil cases, and from every final judgment in the county court in civil cases of which the county court has original jurisdiction, and from every final judgment of the county court in civil cases in which the court has appellate jurisdiction, where the judgment or amount in controversy exceeds one hundred dollars exclusive of interest and costs.